Supreme Court, U. S.
FILED
JAN 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1973

NO. 73-1994

JULIAN VELLA,
Petitioner

-VS-

FORD MOTOR COMPANY,
Respondent

BRIEF OF RESPONDENT

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THE INLAND PRESS, DETROIT, MICHIGAN

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BRIEF OF RESPONDENT

OPINIONS BELOW

The Opnion of the Sixth Circuit Court of Appeals entered on April 8, 1974 affirming in part and reversing in part the Jury Verdict and Order of the District Court for the Eastern District of Michigan, Southern Division, with mandate for entry of Order of Dismissal (26a). The Opinion of the District Court of July 17, 1972 denying respondent's Motion for Judgment Non Obstante Veredicto on the jury award of maintenance and cure under the third count of plaintiff's complaint and denying petitioner's Motion for Interest, attorney fees and costs (19a).

STATEMENT OF JURISDICITION

The Opinion of the Sixth Circuit Court of Appeals affirming in part and reversing in part the Jury Verdict and Order of the District Court with mandate for entry of Order of Dismissal was filed on April 8, 1974. The Order of Dismissal of the District Court pursuant to mandate of the Sixth Circuit Court of Appeals was entered on May 7, 1974 (31a).

Jurisdiction of this Court is invoked under 28 USC 1254(1).

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was docketed on July 8, 1974 with Petition granted on October 21, 1974 but limited to the single question set forth below:

QUESTION PRESENTED

IS A DISABLED SEAMAN WHO CONTRACTED BY TRAUMA A PERMANENT DISEASE WHILE IN THE SERVICE OF A VESSEL ENTITLED TO MAINTENANCE AND CURE PAYMENTS DURING THE INTERIM BETWEEN THE PERIOD THE ACCIDENT OCCURRED AND THE TIME THE DISEASE WAS MEDICALLY DIAGNOSED AND PROCLAIMED INCURABLE?

COUNTER STATEMENT OF THE CASE

Petitioner was an oiler employed aboard the S.S. ROBERT S. McNAMARA. He claimed that in early April 1968, while replacing a lower engineroom deck plate, he slipped and fell on the oily plate, causing his head to strike an electrical box. There was some doubt as to whether petitioner reported the accident at the time.

Thereafter petitioner claimed he suffered from dizziness, headaches, imbalance and fear of falling. He continued to perform his regular duties aboard the vessel until June 28, 1968.

On June 28, 1968 petitioner was discharged for failure to obey the orders of a superior officer.

On June 29, 1968, petitioner was paid off and left the vessel upon arrival at respondent's dock in River Rouge, Michigan. At that time the Third Assistant Engineer prepared his discharge papers. He was then informed by petitioner of the accident which had occurred in early April. Petitioner requested, and was given, a Master's Certificate (hospital ticket) which permitted him to go to the U.S. Public Health Service Hospital, Detroit.

Immediately upon leaving the vessel, petitioner was examined at respondent's plant hospital staffed by 15 physicians and 89 nurses (75a) and headed by Dr. David Charles Laderach (54a).

Based upon information supplied by petitioner, Dr. Laderach gave a diagnosis of "alleged left parietal contusion". Inasmuch as petitioner denied visual difficulties, nausea, vomiting, dizziness or headaches and the Romberg test was negative and finger tofinger and finger to nose test normal (61a) together with a lack of any objective findings (86a), Dr. Laderach ruled out vestibular damage (85a), but based upon petitioner's description of something "electrical" in his head decided the complaint could relate to a tiny nerve branch contusion (61a). This he considered minor and after prescribing a cold pack to reduce the electrical sensation and Darvon for pain discharged petitioner as "able to work" (62a).

On July 9, July 16 and September 30, 1968, petitioner was seen at the U.S. Public Health Service Hospital, Detroit. Following each of these visits petitioner was declared "Fit for Duty" (50a-52a). It is to be noted that petitioner stated he had no unconsciouness, no headaches, dizziness or other neural problems, (50a-51a), and nothing of an objective nature was found. Instructed to return as necessary and if symptoms persist a neurological work-up would be undertaken, *Petitioner never returned.*

On January 15, 1970, at the request of his counsel, petitioner was seen by Dr. Jamie T. Benitez who conducted an electronystagmography test, the results of which showed a vestibular labyrinthine disorder on the *left.*

On April 21, 1970, at the request of his counsel, petitioner was examined by Dr. Joseph Berke, a neurologist (39a). The examination was negative except for a positive Romberg test wherein some swaying backward and to the right was noted when petitioner's eyes were closed (40a). This suggested to Dr. Berke that petitioner had a vestibular disorder—damage to the balancing mechanism of the inner ear 40a-41a). Dr. Berke testified he would defer a prognosis to an otologist (ear specialist) and he did not know whether petitioner's condition was permanent or not (48a).

On September 30, 1970, at respondent's request, the petitioner was examined by Dr. Nielsen, a neurosurgeon (34a). He testified his examination and tests showed no objective evidence of any residual trauma either to the brain, spinal cord, intervertebral discs, or any of the ensuing nerves. He stated that if the symptoms of dizziness persist, an evaluation by an ear specialist might prove helpful, but from a neurological standpoint he could find no basis for plaintiff's symptoms (38a).

Dr. Edward Richard Heil, an otolaryngologist, called by respondent, examined petitioner and testified that as a result of an electronystagmographic test repeated at his request, by Dr. Benetiz, he concluded the petitioner had a vestibular disorder. This test indicated a vestibular disorder on the *right* as contrasted to the vestibular disorder on the *left* found in the test of January 15, 1970 (92a). Dr. Heil confirmed the diagnosis of a vestibular disorder. He stated there was no known treatment leading toward a *cure* of the vestibular disorder and the only treatment is to ease the patient's symptoms *but the condition as such was not curable* (98a).

From the date of the accident in early April of 1968 and from the date of his leaving the vessel on June 29, 1968, petitioner received *no treatment* whatever except analgesics for headaches and *no treatment* of any kind leading toward a *cure* of his condition.

Petitioner instituted suit in the United States District Court for the Eastern District of Michigan, Southern Division with a count for negligence under the Jones Act 46 USCA §688, a count alleging unseaworthiness of the vessel under the General Maritime Law and a count for maintenance and cure (2a).

The jury decided adversely to petitioner on the issue of liability, finding the accident was due to the sole negligence of petitioner (15a) and found petitioner was entitled to maintenance and cure from June 29, 1968, the date of his discharge from the vessel to June 29, 1970.

Respondent moved for Judgment Non Obstante Verdicto relative to the maintenance and cure award and petitioner moved the Court for attorneys fees, interest and

costs. The Trial Court denied both motions (19a-24a). On May 26, 1972 petitioner appealed to the Sixth Circuit Court of Appeals as to the first cause of action pertaining to negligence under the Jones Act and the second cause of action pertaining to unseaworthiness under the General Maritime Law of the Jury Verdict of No Cause for Action (25a). On August 12, 1972 respondent followed with an appeal to the Sixth Circuit Court of Appeals on the propriety award for maintenance and cure (26a).

Under date of April 8, 1974, the Sixth Circuit Court of Appeals affirmed the Jury Verdict of No Cause for Action under the negligence (Jones Act) and unseaworthiness (General Maritime Law) counts of petitioner's complaint and reversed as to the award for maintenance and cure (26a).

Petitioner thereupon filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the question of maintenance and cure and a two-part question pertaining to negligence and unseaworthiness.

Under date of October 21, 1974, this Honorable Court granted the Writ of Certiorari as to the question of maintenance and cure *only*.

ARGUMENT

I

THE MEANING AND ORIGIN OF THE DOCTRINE

Little need be said concerning the history of the Doctrine of Maintenance and Cure as it is known and understood under the general maritime law of the United States.

The Sixth Circuit Court of Appeals found that the jury award of maintenance and cure was without material support in the record and the action was remanded to the District Court for an Order of Dismissal.

In its opinion, the Court set forth the criteria for payment of maintenance and cure which is in accordance with *the overwhelming weight of judicial authority*. In discussing the applicable law, the Court stated:

> "Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the ship. *Aquilar* v. *Standard Oil Company,* 318 U. S. 724 (1943).
>
> The duty of the shipowner to maintain and care for the seaman exists *only* until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States,* 336 U.S. 511, 518 (1949). In brief, once the seaman reaches 'maximum medical recovery,' the shipowners obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson,* 369 U.S. 527, 531 (1962)."

The Court found that Petitioner's vestibular disorder was of a permanent nature from the date of the accident and not susceptible of curative treatment. In discussing this point, the Court stated:

"****Presumably, the jury concluded that it was plaintiff's fall that caused the disorder and the disabling dizziness and headaches. However, the evidence clearly shows that a vestibular disorder is not a condition that can be cured or improved by treatment. ***No evidence was introduced in conflict with this conclusion of Dr. Heil [the Otolaryngologist]

The record in this case does not permit an inference other than that plaintiff's condition was permanent immediately after the accident. It is not even alleged that plaintiff has ever received treatment for the condition itself, although he has received medicine for the symptoms of dizziness and headaches. That one may require or be helped by treatment for the symptoms of a disorder does not qualify him for maintenance and cure. *Farrell* v. *United States,* supra at 519. We find that the jury award of maintenance and cure is without material support in the record."

Petitioner seeks review of the decision of the Sixth Circuit Court of Appeals contending such is contra to a treaty of the United States and in conflict with the holding of *one* Circuit Court of Appeals (3rd) which permits payment of maintenance and cure if treatment is but to ease the symptoms of the disease, but not to cure or improve the condition.

The convention [treaty] cited by Petitioner as support for the proposition that maintenance and cure is payable until the seaman is cured or until the sickness or incapacity has been "declared permanent" is *clearly inapplicable* for the convention was accepted by the United States subject to the "understanding" that it was to apply to "navigation on the high seas only". The case at bar arose on the Great Lakes hence by its own terms, the convention does not apply, infra at pg. 19-20.

The law concerning the duration of the payment of mainnance and cure *does not* state such continues until the sickness or incapacity has been "declared of a permanent nature".

The overwhelming weight of judicial authority provides the seaman is entitled to payment of maintenance and cure until he is cured to the "maximum extent possible", *Farrell* v. *United States,* 336 U.S. 511, 518 (1949) or as it has been stated once the seaman reaches "maximum medical recovery", the shipowners obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson,* 369 U.S. 527, 531 (1962).

The Sixth Circuit Court of Appeals in commenting on the holding of the Third Circuit, stated:

> "We are aware that the Third Circuit has taken a very liberal view as to when maintenance and cure may be awarded. See *Ward* v. *Union Barge Line Corp.,* 443 F. 2d 565 (3rd Cir., 1971) *This is definitely a minority position and is difficult to square with Farrell* v. *United States,* 336 U.S. 511 (1949). See *Berke* v. *Lehigh Marine Disposal Corp.,* 435 F. 2d 1073, 1076 N. 3 (2nd Cir.)"

The decision of the Sixth Circuit Court of Appeals is in accordance with the overwhelming weight of judicial authority.

The responsibility of the shipowner to provide maintenance and cure extends only until the point of maximum recovery. *Calmar S.S. Co.* v. *Taylor,* 303 U.S. 525 (1938); *Farrell* v. *United States,* 336 U.S. 511 (1949); a seaman is not entitled to "cure" past the point at which his condition cannot be further improved. *Farrell* v. *United States,* supra; *Fitzgerald* v. *United States Lines Company,* 374 U.S. 16

(1963); *Travis* v. *Motor Vessel RAPID CITIES,* 315 F. 2d 805; 810-811 (8th Cir., 1963); *Desmond* v. *United States,* 217 F. 2d 948 950 (2nd Cir., 1954) cert. denied, 349 U.S. 911 (1955); *Stewart* v. *Waterman S.S. Corp.,* 288 F. Supp. 629, 634 (E.D. La., 1963) Aff'd 409 F. 2d 1045 (5th Cir., 1969) cert. denied 397 U.S. 1011 (1970); an injured seaman's recovery for maintenance and cure should not be extended beyond the time when the maximum degree of improvement is reached. *Luksich* v. *Misetich,* 140 F. 2d 812 (9th Cir., 1944) cert. denied 64 S. Ct. 1280, 322 U.S. 761; *Berke* v. *Lehigh Marine Disposal Corp.,* 435 F. 2d 1073 (2nd Cir., 1970); the defendant is not liable for treatment which is only palliative in nature, i.e. that which eases without curing. *Stanovich* v. *Jurlin,* 227 F. 2d 249 (9th Cir., 1955); one who is injured or becomes ill while serving as a seaman is entitled to maintenance and cure during that period of time in which he is suffering from a curable disability and obtaining curative treatment therefor. That right ceases, however, when the seaman has reachd his maximum recovery. A continuation of treatment does not continue the right to maintenance and cure if that treatment is palliative, only, as distinguished from curative treatment. *Farrel* v. *United States,* supra; *Calmar S.S. Corp.* v. *Taylor,* supra; *Roier* v. *Head & Head, Inc.,* 226 F. 2d 927 (5th Cir.); *Ryan* v. *U.S. Lines Co.,* 303 F. 2d 430 (2nd Cir.).

As stated in *Farrell* v. *United States,* supra:

> "The liability for maintenance and cure does not extend beyond a time when the maximum cure possible has been effected, and Petitioner is *not* entitled to maintenance so long as he is disabled or for life. Id at 511, 69 S. Ct. 707."

Brief comment should be made on the decision of the learned District Court Judge wherein Respondent's Motion for Judgment Not Withstanding the verdict was denied.

The Court's decision was based upon *Marzean* v. *Nicholson Transit Co.,* 174 F. Supp. 348, USDC, E.D. Mich. 1959. This case is readily distinguishable from the case at bar. In *Marzean,* the Court stated at Page 350: [and at 68a]

> "We think that the only proper interpretation of the rule is that once the administration of curative treatment has ceased because medical science can do no more for the patient to improve his condition, the the seaman's right to maintenance and cure ceases."

Respondent has no quarrel with the above statement, however, it is clearly inapplicable to the case at bar for *curative treatment never commenced* in the case of Petitioner herein. The vestibular condition was incapable of cure from inception and no known treatment leading toward a cure was or is available. Petitioner received no treatment whatever except analgesics for headaches and pain. This merely served to ease his condition and such does not provide the basis for an award of maintenance and cure. In effect the right to maintenance and cure never attached. The maximum degree of improvement in the health of the Petitioner due to the vestibular condition was reached upon inception and recovery for maintenance and cure does not extend beyond this point.

Irrespective of the history of the doctrine recited by Petitioner, this case is *not* concerned with the abondonment of a seaman (Petitioner) in a foreign port.

To the contrary, Petitioner was delivered to his home port and received medical care (Dr. Laderach 60a), and

discharged "able to work" and at the U.S. Public Health Service Hospital (49a-52a) until he was declared "fit for duty."

Respondent does not contend that the issuance of a "fit for duty" slip by the U.S. Public Health Service is, in and of itself, conclusive as to the seaman's condition. *But,* where as here, Petitioner received *no treatment* whatever except analgesics for headaches and Darvon for occasional pain, *none of which was curative in nature,* but merely palliative in nature, i.e., to ease the symptoms of the disease, provides no grounds, under the law for payment of maintenance and cure by respondent.

In *Farrell* v. *United States,* 336 U.S. 511, this Court stated at 513:

> "The Court below concluded that the duty of a shipowner to furnish maintenance and cure *does not extend beyond the time where the maximum cure possible has been effected.*"

Farrell continued by referring to the ancient laws concerning maintenance and cure and stated at 514:

> "We need not elaborate upon the meaning or weight to be given to these medieval pronouncements of maritime law***. But construe the old-time law with what liberality we will, it cannot be made to cover the facts of this case***."

Admittedly there is no authority in any statute or American Admiralty decisions for the proposition that he is entitled to maintenance for life.

And at 515:

> "It is claimed, however, even if the basis for a lifetime award does not exist, that he is entitled to maintenance and cure, beyond the time allowed by the Courts below. This is based largely upon state-

ments in the opinion of the Court in Calmar Steamship Corp v. Taylor, 303 U.S. 525, 58 S. Ct. 651, 654, 82 L. Ed. 993. There the question stated by the Court was whether the duty of the shipowner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ, extends to the payment of a lump-sum award sufficient to defray the cost of maintenance and cure for the remainder of his life. The Court laid aside cases where incapacity is caused by the employment and said, 'We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage *in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing care and medical treatment.* This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service.'

It is claimed that when the Court reserved or disclaimed any judgment as to cases where the incapacity is caused 'by the employment' or "by the seaman's service' it recognized or created such cases as a separate class for a different measure of maintenance and cure. *We think no such distinction exists or was premised in the Calmar case.*"

II

SCOPE OF MAINTENANCE AND CURE

Respondent contends Petitioner failed to bring himself within the scope of maintenance and cure *because Petitioner failed to prove* that the medical care and attention received has produced or is likely to produce some lasting medical recovery or improvement in his condition. The criteria is *not* that he is entitled to maintenance and cure until

the disease was medically diagnosed and proclaimed incurable. Rather, he is entitled to maintenance and cure *only* until the seaman is cured to the "maximum extent medically possible." *Farrell* v. *United States,* 336 U.S. 511, 518 (1949). Once the seaman reaches "maximum medical recovery", the shipowner's obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson,* 369 U.S. 527, 531 (1962). Here, the Petitioner's condition was incurable at the onset of the condition which occurred immediately following the accident.

Secondly, the treatment received by Petitioner, analgesics for headaches and davron for pain, was but palliative in nature, i.e., to ease without curing. Under the decided cases, such does not provide the basis for the payment of maintenance and cure. *Farrell* v. *United States,* supra; *Calmar S.S. Corp.* v. *Taylor,* 303 U.S. 525. The rule, in effect, as stated by this Court is as follows:

> "One who is injured or becomes ill while serving as a seaman is entitled to maintenance and cure during that period of time in which he is suffering from a curable disability and obtaining curable treatment therefor.*** The right ceases, however, when the seaman has reached his maximum recovery***. A continuation of treatment *does not* continue the right to maintenance and cure if that treatment is palliative, only, as distinguished from curative treatment."

The Petitioner bears the burden of alleging and proving facts that bring him within the scope of maintenance and cure. *Prendis* v. *Central Golf Steamship Co.,* 330 F. 2d 893 (CA 4th, 1963); *Donovan* v. *Esso Shipping Company,* 152 F. Supp. (D.C.N.J., 1957; The San Antonio, 1 F. Supp. 231, Aff'd 61 F. 2d 623 (3rd Cir., 1932)).

To recover for maintenance and cure, Petitioner must *first* show his injury or illness was incurred or became manifest while in the service of the vessel. The jury below apparently resolved this question of fact by its verdict wherein it stated Petitioner's accident aboard the S.S. ROBERT S. McNAMARA was due to his sole negligence. However, the record is replete with reports of prior accidents and illnesses wherein Petitioner complained of the very same symptoms of dizziness, headaches, "something hot in his head," as those involved in the case at bar. (63a, 64a, 65a, 66a, 67a) and from the records of the U.S. Public Health Service Hospital (52a, 53a). While the jury below found the accident of which he claimed caused his disablement was due to his sole *negligence,* it did not say the accident itself was the *cause* of his disablement.

The complete medical examination by Dr. Laderach (54a) and on three visits to the U.S. Public Health Service Hospital on July 9, 1968, July 16, 1968 and September 30, 1968 (50a and 51a) found just to the contrary and deemed Petitioner "able to work" and "fit for duty". As a matter of fact Dr. Laderach *did not,* after a complete examination, diagnose a vestibular disorder in Petitioner. He diagnosed quite the opposite (82a).

Petitioner went to great lengths via the testimony of Dr. Berke (38a) to show the vestibular disorder or disease occurred at the time of the alleged accident and that he suffered from such on the date he left the vessel, to-wit June 29, 1968.

Assuming arguendo this to be true and that the jury believed the accident on the McNAMARA was the causative factor of Petitioner's disablement, it is this additional element of proof wherein plaintiff failed to sustain his burden,

i.e., *that the medical care and attention received produced or was likely to produce some lasting medical recovery or improvement in his condition.* This is the sum and substance of "cure".

It is unrefuted that Petitioner suffered from a vestibular disorder which is incurable. Petitioner contends that while such was not diagnosed until some year and a half after he left the vessel, he relates this disability to the date of the alleged accident in early April, 1968 and that he suffered from the disability when he left the vessel so as to bring himself within the scope of maintenance and cure. It is likewise unrefuted that there is no known medical treatment leading toward a cure of the vestibular disorder. The treatment given is but palliative, in nature i.e., to ease without curing. The only treatment rendered to Petitioner *at any time* was analgesics for headaches and darvon for pain.

Under the above facts, the cases are clear and cogent that Petitioner failed to sustain his burden of bringing himself within the scope of maintenance and cure and that he is *not* entitled to maintenance and cure in any amount. In *Mackey* v. *National Steel Corporation,* 292 F. Supp. 222 (D.C.N.D. Ohio, 1967), Aff'd by the Sixth Circuit Court of Appeals on October 29, 1968, Case No. 18087, the Court was concerned with a totally disabling back condition in a seaman and the question of maintenance and cure. The Court, in discussing what the seaman must prove, stated at page 225:

> "To show that his ship service connected incapacity has not yet reached the level of maximum cure, i.e., maximum medical improvement, *it is concluded the seaman must prove that the medical care and attention has produced or is likely to produce some lasting medical recovery or improvement in his condition.*" (emphasis ours)

The above statement followed a full discussion of the cases involving maximum cure in regard to permanent injury or disease and in particular *Farrell* v. *United States,* 336 U.S. 511, 69 S. Ct. 707. Again at page 225, the Court in Mackey, supra, stated:

> "Farrell, supra, demonstrates and defines a different measure of damages in an action for maintenance and cure. Seaman Farrell needed medical care from time to time 'to ease attacks of headaches and epiliptic convulsions.' Though necessitated by his injuries suffered in the service of the ship, a requisite for compensable cure, *Farrell's intermittent medical care did not qualify as compensable cure because it served only to ease his condition, while producing no lasting improvement.*" (emphasis ours)

See also *Stewart* v. *Waterman Steamship Corporation,* 288 F. Supp, 629 (D.C.E.D. La. 1968) aff'd CA 5th, 409 F. 2d 1045, cert. den 90 S. Ct. 1239, 397 U.S. 1011.

The given point when petitioner reached maximum cure or maximum medical improvement was when the accident occurred in April, 1968. The definitive diagnosis a year and a half later only served to establish the nature of the disability as being a vestibular disorder which condition is incurable.

Failing then to prove he suffered from a curable ailment or condition and received curable treatment therefor, *the shipowner's obligation for maintenance and cure never came into being or to phrase it another way, Petitioner failed to bring himself within the scope of maintenance and cure.*

To provide a basis for payment of maintenance and cure, the treatment being received by a seaman *must* be treatment leading toward a *cure*. This means treatment of the underlying or primary injury or illness and *not* its symptoms. *Stewart* v. *Waterman Steamship Corporation,* supra.

This in essence was the conclusion of the Sixth Circuit Court of Appeals in reversing the maintenance award by the jury and is in full accord with the decision of this Court.

At page 9 of his brief Petitioner recites "that the Sixth Circuit holding would work to defeat the vital purpose of the doctrine in at least two instances which would inevitably arise.

> (1) Where a seaman lies helplessly ill with an undetermined or undeterminable diagnosis of his sickness, this holding would prevent urgent operation of the humanitarian doctrine for want of definitive medical pronouncement."

Such is manifestly untrue. Merchant seamen (Petitioner) have available to them the vast resources of the U.S. Public Health Service at no cost to them. It is worthy of note here that on the date Petitioner was last seen at the U.S. Public Health Service Hospital, Detroit on September 30, 1968 the entry reads (51a):

> "Return to clinic p.r.n. [if necessary] Fit for duty. If persists, will have to do neurological in-patient w.u [work-up]."

Thus Petitioner was *free to return* to the hospital if his symptoms persisted *yet no record indicates he did so.* In addition the cases are clear that had treatment been available anywhere for Petitioner's ailment, he could have sought and obtained such treatment and Respondent would have been obligated to undertake this expense if such treatment was not available through the facilities of the U.S. Public Health Service.

> "(2) Where sickness or injury of a seaman is primarily diagnosed as curable and maintenance and cure payments are made, then subsequently the sickness is diagnosed as incurable, the holding would make the seaman a debtor to the shipowner for amounts previously paid."

Such a statement is pure conjecture and speculation and in no instance has such ever been presented nor contemplated.

Petitioner's quotation at the top of page 10 of his brief applies *only* when on a foreign voyage not when in the home port of the seaman himself.

III

DURATION OF MAINTENANCE AND CURE

Petitioner (146a) cites 54 Stat. 1936, (Shipowner's Liability Convention), Article 4, Paragraph 1 as being involved herein which paragraph reads as follows:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured peron has been cured, or until the sickness or incapacity has been *declared of a permanent nature*". (underscoring ours)

Respondent contends the cited convention is *inapplicable* by its own terms to the case herein, *which occurred on the Great Lakes.* Article 1, Paragraph 1 reads as follows: (147a)

> "1. This convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this convention is on force and ordinarily engaged in *maritime navigation.*"

Article 20 provides: (158a)

> "The French and English texts of this convention shall both be authentic, with the following understanding to be made a part of the ratification:
>
> "*** that the United States Government understands and construes the words, "maritime navigation" appearing is this convention to *mean navigation on the high seas only.*
>
> SEE ALSO the Law of Admiralty, Gilmore and Black, Page 277, §6-19—Same: Shipowner's Liability Convention; 54 Stat. 1936, 1938 A.M.C. 1297; 6B Benedict, Admiralty 1315 (7th Ed. Rev.)

In the first instance it must be recognized the above convention was ratified by the Senate and the President of the United States *subject to understandings* (146a).

Those *understandings* are clearly set forth (158a) and state:

> "That the United States Government understands and construes the words 'maritime navigation' appearing in this convention to mean *navigation on the high seas only'.*"

By its own language the convention is *inapplicable* to cases arising on the Great Lakes.

Contrary to Petitioner's assertion that this Court *applied* the draft convention in *Farrell* v. *United States,* supra, the Court merely made a passing reference to the convention by stating:

> "While enactment of this general rule by Congress would seem controlling, it is not amiss to point out that the limitation thus imposed was in accordance with the understanding of those familiar with the laws of the sea and sympathetic with the seaman's problem."

Clearly *Farrell* stated the bounds of the duration of maintenance and cure under our law at 518:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage *only* until *he was cured so far as possible,* seems to have been the doctrine of the American Admiralty courts prior to the adoption of the Convention by Congress***"

The proofs in the case at bar are clear beyond the peradventure of a doubt that Petitioner's vestibular condition was *incurable* upon onset whether it was caused by the accident of April, 1968 *or* due to the man's prior history of accidents and illnesses. If it is to be believed he suffered from the ailment when he left the S.S. ROBERT S. McNAMARA on June 29, 1968, then, at that point in time, "*he was cured so far as possible*" and no obligation rested upon the shopowner to pay maintenance and cure in any amount.

At page 12 of his brief Petitioner recites the Sixth Circuit holding (28a) that Petitioner's "maximum medical recovery" in accordance with *Vaughn* v. *Atkinson,* 369 U.S. 527 (1962) at 531 was reached the moment the traumatic incident occurred.

THE CORRECT AND COMPLETE recitation of the holding and quotation of the Appellate Court is as follows:

> "Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the vessel Aquilar v. Standard Oil Co., 318 U.S. 724 (1943). The duty of the shipowner to maintain and care for the seaman exist only until the seaman is cured to the maximum extent possible. Farrell v. United States, 336 U.S. 511, 518 (1949). In brief, once the seaman reaches 'maximum medical recovery,' the shipowner's obligation to provide maintenance and cure ceases. Vaughn v. Atkinson, 369 U.S. 527, 531 (1962).

The defendant contends that the plaintiff's injury was permanent from the date of the accident and was never susceptible of curative treatment. Dr. Heil testified that although he could not determine from his examination what had caused the vestibular disorder, a severe blow to the head could have caused this problem. Presumably the jury concluded that it was plaintiff's fall that caused the disorder and the disabling dizziness and headaches. *However, the evidence clearly shows that a vestibular disorder is not a condition that can be cured or improved by treatment.* When asked whether plaintiff might be cured by treatment, Dr. Heil testified:

No, not really. Treatment is primarily symptomatic for this condition. That is, people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication. *Other than that, there is no specific cure or treatment.*

No evidence was introduced in conflict with this conclusion of Dr. Heil.

The record in this case does not permit an inference other than that plaintiff's condition was permanent immediately after the accident. It is not even alleged that plaintiff has ever received treatment for the condition itself, although he has received medicine for the symptoms of dizziness and headaches. *That one may require or be helped by treatment for the symptoms of a disorder does not qualify him for maintenance and cure. Farrell* v. *United States*, supra at 519. We find that the jury award of maintenance and cure is without material support in the record." (emphasis added)

Contrary to Petitioner's assertions at page 12 of his brief, *Farrell*, supra went directly to the question of

whether maintenance and cure is payable in an instance where the seaman suffers from an incurable disease, but will require some medical care to ease attacks of headaches and epileptic convulsions.

Farrell, *affirmed* the Court below where it concluded *the duty of a shopowner to furnish maintenance and cure does not extend beyond the time when the maximum cure possible has been effected.*

Petitioner's entire case is premised upon the *distinctly minority* holding of the Third Circuit Court of Appeals which has interpreted the holding of Farrell that the liability for maintenance and cure does not extend beyond the time when the maximum possible cure has been effected to *extend* the obligation where medical care is needed to arrest further progress of the disease or to relieve pain. *Neff* v. *Dravo Corp.*, 407 F. 2d 228 (3rd Cir., 1969); *Yates* v. *Dann*, 124 F. Supp. (D. Del. 1954); Aff'd 223 F. 2d 64 (3rd Cir. 1955).

Such an extension completely distorts the doctrine of maintenance and cure.

In responding to this argument, *Farrell*, supra at 519 stated:

> "Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life. Indeed the custom of providing

maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. The Government does not contend that if *Farrell* receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.

The need of this seaman for permanent help is great and his plight most unfortunate. But as the evidence has afforded no basis for supplying that need by finding negligence, neither does the case afford a basis for distortion of the doctrine of maintenance and cure. This seaman was in the service of the United States and extraordinary measures of relief while not impossible are not properly addressed to the courts." (emphasis added)

Petitioner contends at page 13 of his brief that Respondent's ear specialist, Dr. Heil, did not examine Petitioner until March 20, 1972 and his first declaration as to the permanency of Petitioner's disability was not made by him until the time of trial on March 27, 1972. *Petitioner does not comment* on the fact *that as early as January 15, 1970,* at the request of his counsel, the vestibular disease was discovered in the examination by Dr. Jamie T. Benitez. Even at that point in time no treatment was given leading toward a cure for none was known then or at the time of trial which would lead to a *cure* of the condition.

Respondent maintains the examination by Dr. Laderach at its plant clinic which was staffed by 15 physicians and 89 nurses was complete and thorough. He performed those tests which would ordinarily have detected a vestibular disorder, but finding them normal ruled against a diagnosis of vestibular disorder (82a).

Petitioner points to the fact Dr. Laderach requested no repeat visits following his examination. *It is worthy of note however* that Petitioner was examined on three occasions, July 9, July 16 and September 30, 1968 at the U.S. Public Health Service Hospital, Detroit—all subsequent to the examination by Respondent's Dr. Laderach (49a-51a) and found "fit for duty." On the last of such visits Petitioner was advised to return "as necessary" if the symptoms persisted and a complete workup would be performed. *Petitioner never returned.*

It is untrue the jury below found that petitioner incurred his vestibular disorder aboard the ship as stated on page 17 of petitioner's brief. *No such finding was made by the jury.* Nor can it be said that Dr. Heil was the only physician who diagnosed the vestibular disorder. Such was *diagnosed* as early as *January 15, 1970* by petitioner's own physician, Dr. Benitez.

SUMMARY

Under the maritime law of the United States, a shipowner is liable to a seaman for maintenance and cure, regardless of the negligence of either party, if the seaman is injured while in the service of the ship. *Aquilar* v. *Standard Oil Co.,* 318 U.S. 724 (1943).

The duty of the shipowner to maintain and care for the seaman exists only until the seaman is cured to the maximum extent medically possible. *Farrell* v. *United States,* 336 U.S. 511, 518 (1949). In brief, once the seaman reaches "maximum medical recovery", the shipowner's obligation to provide maintenance and cure ceases. *Vaughn* v. *Atkinson,* 369 U.S. 527, 531 (1962).

The jury found the accident alleged by Petitioner was due to his sole negligence and denied recovery on the theory of negligence or unseaworthiness. The jury made no specific finding that the alleged accident caused the vestibular disorder.

Assuming arguendo, the jury did think such was the case, the testimony is unrefuted that the vestibular disorder was at the date of inception and is incurable nor can it be improved by treatment.

When asked whether Petitioner might be cured by treatment, Dr. Heil testified (96a):

> "No, not really. Treatment is primarily symptomatic for this condition. That is, people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication. *Other than that, there is no specific cure or treatment.*"

That one may require or be helped by treatment for the symptoms of the disorder does not qualify him for maintenance and cure. *Farrell* v. *United States,* supra, at 519.

In The Bouker No. 2, 241 F 831, the Court stated at 835:

> "The limits of care or cure, both as to kind of treatment and time of continuance, must always depend on the facts of each particular case."

The facts of the case at bar are such as call for a denial of maintenance and cure to Petitioner *in any amount* for the simple and cogent reason that Petitioner's condition was incurable upon inception whether the condition was due to the series of accidents and illnesses of Petitioner prior to his service on the ROBERT S. McNAMARA or due to

the alleged accident in April 1968. The stark fact remains — *the condition was and is incurable.* No specific cure or treatment for the condition was or is available. Petitioner had reached a point of "maximum recovery" upon inception of the vestibular disorder and consequently the shipowner's obligation to provide maintenance and cure never came into being. *Farrell* v. *United States,* supra; *Vaughn* v. *Atkinson,* supra.

The single question submitted for review herein must, under the law, be answered in the negative.

Replying briefly to Petitioner's claim for reasonable attorney fees at Page 18 of his brief, Respondent recites the finding of the Learned District Judge below: (23a-24a)

> "In our case, it is not disputed that the shipowner withheld maintenance and cure in the good faith belief, based upon physical examinations of the plaintiff following his fall, that the plaintiff was fit for duty. Since there is no evidence of callousness on the part of the defendant, attorney's fees will not be awarded. For these reasons, plaintiff's motion for interest and attorney fees is denied as well."

CONCLUSION

1. The decision of the Circuit Court of Appeals for the Sixth Circuit should be affirmed.

2. The only question certified for review under the Writ is that pertaining to Petitioner's right to maintenance and cure under the facts of this particular case and not for attorney's fees in connection therewith.

3. Petitioner's request for attorney's fee and costs of this appeal should be denied.

Respectfully submitted,
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